In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-733

FERINAND GRAVES, ET AL., PETITIONERS

v.

JAMES T. LYNN, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners are residents of a racially integrated neighborhood adjoining East Hills Village, a federally-subsidized low and moderate income housing project located in Kansas City, Missouri. In June 1971, they sued to enjoin construction of the project, then still in the planning stage, on the grounds that the Secretary and the Department of Housing and Urban Development (HUD) had violated the Civil Rights Acts of 1964 and 1968 by selecting the East Hills Village site without considering its effect in increasing racial concentration in the neighborhood. Petitioners contended that the HUD project would cause the integrated neighborhood to become all-black. A preliminary injuction was not sought; thus construction of the project commenced and continued during the course of the law suit.

After an evidentiary hearing, the district court, relying on *Shannon* v. *United States Dept. of Housing & Urban Dev.*, 436 F.2d 809 (C.A. 3), held that the Housing Act of 1949, 42 U.S.C. 1441 *et seq.*, together with the Civil Rights Act of 1964, Title VI, 42 U.S.C. 2000d *et seq.*, and the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*, required that HUD "must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts" (Pet. App. A12, quoting 436 F.2d at 821). The district court found that the East Hills Village project would have a detrimental impact on the racial balance of nearby areas, and that HUD's failure to consider this fact entitled the plaintiffs to relief under the Civil Rights Acts.

By the time the district court announced its decision on April 6, 1973, the project was already substantially completed and occupied.[1] As the district court no longer could prevent completion of the project, it permanently enjoined any further federal financial assistance to the project.

On appeal, the government did not challenge the findings of civil rights violations, but challenged the remedy of reneging on contracts made for the project. The government pointed out that those who built and financed the project in reliance on the HUD contracts, and who are not parties to this action, would thereby lose several hundred thousand dollars. The government also urged that the injunction removes the government from any further involvement in the project, thereby eliminating the only agency that could be compelled to oversee the project to at least ameliorate the existing racial imbalance.

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[1]At this time, over 86 percent of the occupants of the project were black.

The court of appeals in a unanimous opinion (Pet. App. A1-A8), reversed and remanded the case to the district court with instructions to (Pet. App. A8):

> fashion appropriate relief which will minimize the effects of the government's failure to observe its own procedural requirements and which will best assure that this project will ultimately benefit both the tenants and the community.

The decision below is correct, and there is no conflict among the circuits. Moreover, review at this time would be inappropriate because no final decree has yet been entered and the district court has not had the opportunity to consider the matter of alternative relief.

1. Contrary to petitioners' contentions (Pet. 16-27), the court of appeals has not ruled that federal financial assistance may never be enjoined where a project has been completed. The court of appeals appears to have recognized that in a proper case such a prohibition may be an appropriate remedy (Pet. App. A7). However, in this case the court of appeals found that (Pet. App. A5-A6):

> The relief provided by the district court in this case cannot achieve either the restorative or preventive functions of equity. First, enjoining federal financial assistance has the effect of virtually eliminating any public control over the project's operation. Second, this belated termination of federal support cannot alter the fact that the racial composition of this neighborhood has already become predominantly black. We must further recognize that the project has been constructed and is already occupied by almost two hundred tenants. Under these circumstances, termination of governmental financial assistance promised to the owners and the mortgagee is not an appro-

priate remedy. What is needed are imaginative solutions—aimed at realistically dealing with the problems emanating from HUD's decision.

The court of appeals could properly order a remand to the district court to consider alternatives to the drastic and inflexible remedy imposed by the district court.

2. Petitioners also err in contending (Pet. 16-18) that the decision below is in conflict with *Shannon* v. *United States Dept. of Housing & Urban Dev.*, 436 F.2d 809 (C.A. 3). There, as here, the appellate court remanded to the district court to consider alternative forms of relief. See 436 F.2d at 822-823. In each case HUD agreed that under its new site selection guidelines, 36 Fed. Reg. 12032 (1971), the challenged project would not have been approved. Despite that determination, on remand the district court in *Shannon* lifted the injunction against further federal assistance and ordered completion of permanent financing. Thus, there is no conflict with *Shannon*.[2]

3. In the absence of a preliminary injunction, the private developer had every right to proceed with construction of the East Hills Village project while this litigation was pending. Although petitioners contend that these private individuals—released by petitioners as parties to this lawsuit (App. in the court of appeals, p. 23)—should have stopped construction once this lawsuit was filed (Pet. 5-7; 2[illegible]), such housing would seldom be completed if construction could be stopped by the mere filing of a suit. A preliminary injunction is designed to pre-

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[2]There is also no conflict with *Ely* v. *Velde*, 497 F.2d 252 (C.A. 4) (Pet. 18-20), which terminated Federal funding obtained for a prison whose location was selected in violation of the National Environmental Policy Act and National Historic Preservation Act. In *Ely* the project had not yet begun, and the fund cutoff affected only the State of Virginia, the body that had failed to comply with the NEPA and NHPA.

vent the occurrence of such situations as the instant case, where irreversible action has been taken. The private parties could reasonably assume that since petitioners did not seek a preliminary injunction, they were free to fulfill their contract. Moreover, petitioners' fear that they would be unable to post an injunction bond does not excuse failure to seek a preliminary injunction. Under Rule 65(c), Fed. R. Civ. P., the amount of security (applicable only to protect a "party"—in this case the United States) rests in the sound discretion of the district court. Petitioners would not, of course, know the actual amount required until they sought the preliminary injunction.[3]

Petitioners' position that the private non-parties must now bear the entire financial loss for the government's civil rights violations (Pet. 20) would have adverse practical implications. Private parties would certainly be deterred from participation in HUD sponsored programs such as Section 236 of the National Housing Act, Title II, 82 Stat. 498, as amended, 12 U.S.C. 1715z-1, involved herein, if faced with the prospect of financial ruin from suits to which they were not parties, based on violations in which they had no part. Consequently, persons of low and moderate income would suffer by the diminution of private construction of such projects.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[3]Contrary to petitioners' view (Pet. 7), and assuming the merit of their position, petitioners could have prevented the developers from building the project with federal funds if they had sought preliminary relief.